

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON
JUNE 1995 SESSION

FILED

February 29, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE)	
)	C.C.A. NO. 02C01-9501-CC-00017
Appellee,)	
)	Hardeman County Criminal Court No. 5697
V.)	
)	Hon. Jon Kerry Blackwood
RICARDO McCLELLAN,)	(Delivery of a Schedule II
)	Controlled Substance (Cocaine)
Appellant.)	Weighing More Than 0.5 Grams)

FOR THE APPELLANT:

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Assistant District Public Defender
P. O. Box 700
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FOR THE APPELLEE:

Charles W. Burson
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OPINION FILED: _____

AFFIRMED

Mary Beth Leibowitz
Special Judge

OPINION

This is an appeal as of right by the appellant, Ricardo McClellan, from a judgment of conviction entered by the Circuit Court of Hardeman County. The appellant was charged with and convicted by a jury of delivery of a Schedule II controlled substance, to wit; cocaine, in an amount more than 0.5 grams pursuant to Tenn. Code Ann. 39-17-417. The trial judge sentenced the defendant to fourteen (14) years in the State Penitentiary as a Range II multiple offender, and affirmed the jury's twenty thousand dollar (\$20,000.) fine. The appellant presents the following arguments in support of his appeal from his conviction and sentence.

1. That the trial court improperly limited effective cross examination of the witness Elizabeth Woods.
2. That exculpatory evidence was improperly withheld from the defense by agents of the State of Tennessee.
3. That the evidence is insufficient as a matter of law to sustain the conviction.

We affirm the conviction and the sentence received by the appellant.

Although the factual history is extensive, the pertinent facts are as follows:

On November 10, 1993, Tennessee State Trooper Guinn Ervin Hall, with the aid of a confidential informant, Elizabeth Woods, arranged a drug buy in Grand Junction, Tennessee. This arrangement was made at a pay phone at a market off Highway 18, in Grand Junction, where a white on green Chevy Caprice approached the trooper and the informant. Two males approached the passenger side window of the trooper's vehicle and were told that the trooper was trying to buy an eight ball of crack cocaine. Trooper Hall testified that one of the males was the defendant, and the other was Rodrick Fretrell. They followed the two males to the home of the defendant, and there the informant went into the house and returned with what appeared to be crack cocaine. The substance tested positive for cocaine through the T.B.I. Crime Laboratory.

Trooper Hall could not state when he had begun to use the informant Elizabeth Woods, although he stated that he had paid her one hundred dollars (\$100.00) for her assistance, and that he had heard that she had at one time had a drug abuse problem. Trooper Hall admitted that he had informed Ms. Woods not to use drugs in front of him, and that she did not do so at any time. The defendant offered some proof of a car other than the one identified by Trooper Hall, and disputed the evidence as to the residence to which the trooper and the informant had gone.

Elizabeth Woods testified that she had begun to work with Trooper Hall and stated that she

had seen the defendant in Grand Junction at a store and that the defendant had told her to follow him to his house. She testified that it was Rodrick Fretrell who was driving the vehicle and that it was a blue vehicle as opposed to a white on green vehicle. Ms. Woods also admitted upon a jury out hearing that she had had a sexual relationship with an uncle of Rodrick Fretrell, and that this uncle had been giving her crack cocaine. She denied that she used drugs during her time as a confidential informant. The trial court at this point ruled that the defense could not inquire from Ms. Woods about her prior drug use. At the motion for new trial, attorney Karen Fleet, testified that she had complained about Trooper Hall conducting himself in an unethical manner, and having engaged in a sexual relationship with the confidential informant. She testified that his supervisor, Dennis Cheairs, appeared to imply that he was aware of such a relationship, however Cheairs testified that he had no knowledge of such a relationship.

As to the first issue, whether or not the trial court properly excluded evidence of the prior drug abuse and the sexual relationship to the uncle of the accomplice in this case, the Court finds that the judge properly made his inquiry pursuant to Rule 608(b) of the Tennessee Rules of Evidence. According to State v. West, 844 S.W.2nd 144 (Tenn. 1992), it is within the discretion of the trial judge to determine whether to admit or exclude the evidence, and there was no proof that the defendant's relationship with Jerry Blaylock, or past drug activity by the informant, (which is not unusual), was sufficient to overcome the presumption of correctness by the trial court. Wood's testimony was not a repetition of that of Trooper Hall, and there was no evidence that on the date of the offense Woods was under the influence nor that she was unable to relate what had occurred. Thus, the first issue is without merit.

The second issue raised by the defense is that exculpatory evidence, that is evidence of a sexual liaison between the Trooper and the informant was wrongfully withheld from the defense. The defense argues that clear and convincing evidence was presented at the motion for new trial concerning this allegation, as made by Attorney Fleet to the supervisor of Trooper Hall. The mere allegation of the attorney to the supervisor without acknowledgment of the supervision of any positive proof regarding this issue amounts to nothing. The defense argues that this relationship is a fact, but it has offered no proof other than the attorney's implication that such a relationship occurred. The defendant has the burden of proof on a motion for new trial and the decision to grant or deny rests within the sound discretion of the Court. Jones v. State, 519 S.W. 2nd 398, (Tenn. Crim. App. 1974), Hicks v. State, 471 S.W. 2nd 849 (Tenn. Crim. App. 1978). The Court finds

that there is "no newly discovered evidence" such as to overrule the trial court's finding that a new trial was not warranted.

The last issue that the defense argues was that there was insufficient evidence as a matter of law to sustain the conviction. The defense argues that there are contradictions, improbabilities, and uncertainties in the accounts rendered by the two witnesses concerning events in a short period of time which they were both supposed to have witnessed. It also argues that the test as to sufficiency of evidence to sustain a verdict of guilty is whether any rational juror could have found the essential elements of the offense beyond a reasonable doubt. To this argument the State asserts that it is entitled to the strongest legitimate view of the evidence and all the reasonable and legitimate inferences which may be drawn therefrom and that the verdict against the defendant removes the presumption of innocence and raises the presumption of guilt of the defendant. State v. Williams, 657 S.W. 2nd 405 (Tenn. 1983). The jury clearly acted within its authority to believe that Woods and McClellan were engaged in this drug sale, and that although there was some differences in their testimony, the jury obviously reconciled them to sustain the issue of whether or not delivery of a controlled substance had occurred. The testimony in this case was clearly resolved by the jury in favor of the State's theory pursuant to Williams, and the defendant did not present evidence which contradicted testimony that the defendant delivered crack cocaine to witness Woods in exchange for two hundred dollars (\$200.00). This Court sustains the finding of the jury and the trial judge as to the evidence in this case.

Accordingly, the judgment as to all issues is affirmed.

MARY BETH LEIBOWITZ, SPECIAL JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE